CITIBANK BHD

v.

BANDAR SUNGAI BUAYA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S1-24-2760-2001]
24 NOVEMBER 2002

LAND LAW: *Charge - Order for sale - Cause to the contrary - Whether there was non-compliance with procedural requirements under O. 83 r. 3 of the Rules of the High Court 1980 - Whether terms of facility agreement varied - Whether cause to the contrary established*

The plaintiff had agreed to grant the defendant syndicated facilities pursuant to a facility agreement. As security for the facilities, the defendant charged certain land ('the said land') in favour of the plaintiff, and under the terms of the charge, the defendant agreed to pay the plaintiff on demand all sums due and owing to the plaintiff in respect of the facilities including the principal sum, interest outstanding and any other monies payable. The defendant defaulted; the plaintiff acted swiftly and obtained summary judgment against the defendant. The defendant failed to make the necessary payments, prompting the plaintiff to issue a letter of demand and form 16D of the National Land Code ('NLC'). Notwithstanding these demands, the defendant still failed to make the payments. Hence, this application by the plaintiff for an order for sale of the said land. The defendant, however, contended that there was cause to the contrary as there was non-compliance with the procedural requirements as set out in O. 83 r. 3 of the Rules of the High Court 1980 ('RHC'). The defendant further alleged that there was a restructure of the facility agreement resulting in variance of the terms therein which also constituted cause to the contrary.

Held:

[1] The plaintiff was entitled to institute and initiate this action as the defendant had blatantly breached the terms of the charge and had failed and refused to make payment of the sums due as demanded in the notice of demand and form 16D of the NLC. (pp 166 d & 156 h)

[2] In its affidavits, the plaintiff had stated the amount owing, the principal sum, the repayments that were made together with the interest or instalments owing at the date of the issue of the originating summons and at the date

of the affidavit, as well as the approximate daily interest. Therefore, the defendant's assertion that the plaintiff had not complied with O. 83 r. 3 of the RHC was entirely without merit. (p 159 e-f)

[3] The restructuring schemes pertaining to the facility agreement did not materialise; hence, it was apparent that the terms of the facility agreement were never superseded nor replaced and it remained valid and binding on both the parties. (p 163 c)

[4] All the issues and allegations advanced earnestly by the defendant were insufficient to constitute cause to the contrary. The plaintiff, at the end of the day, was certainly entitled to an order for sale as prayed for. (p 166 e)

[Ordered accordingly.]

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 ***(refd)***

Bank Pertanian Malaysia v. Zainal Abidin Kassim & Anor [1995] 2 MLJ 537 ***(dist)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(foll)***

Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 ***(refd)***

Jacob v. Overseas Chinese Banking Corporation, Ipoh [1974] 2 MLJ 161 ***(refd)***

Lockett v. Norman Wright [1925] 1 Ch 56 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(foll)***

Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 ***(refd)***

Malaysian International Merchant Bankers v. Dhanoa Sdn Bhd [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193 ***(refd)***

Mary Michael v. United Malayan Banking Corp Bhd [1971] 1 MLJ 172 ***(refd)***

Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd [2000] 2 CLJ 73 ***(refd)***

National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 ***(refd)***

OCBC Bank (M) Bhd v. CTK Enterprise Sdn Bhd [2000] 6 CLJ 158 ***(refd)***

Oriental Bank v. Chop Seng Restaurant (Butterworth) Sdn Bhd [1990] 3 MLJ 493 ***(refd)***

Standard Chartered Bank v. Yap Sing Yoke & Ors [1989] 1 CLJ 530; [1989] 2 CLJ (Rep) 500 ***(refd)***

Syarikat Kewangan Melayu Raya Bhd v. Malayan Banking Bhd [1984] 1 CLJ 78; [1984] 1 CLJ (Rep) 363 ***(refd)***

Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd [1986] 2 MLJ 253 ***(refd)***

Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch 284 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 253, 256(3), 271, forms 16D, 16E

Rules of the High Court 1980, O. 83 r. 3

For the plaintiff - Shirlena Yogeswaran; M/s Shearn Delamore & Co
For the defendant - Rajasurian Ramasamy; M/s Abu Talib Shahrom & Zahari

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of an originating summons in encl. 1, the plaintiff sought for the following prayers:

1. That the lands held under H.S.(D) No. 10778, P.T. No. 10452, Mukim Serendah, and H.S.(D) No. 10779, P.T. No. 10453, Mukim Serendah (hereinafter referred to as the "said lands") charged to the Plaintiff under the Charge presentation No. 41875/96, Jilid 111, Folio 55 be sold by public auction pursuant to Sections 256 and 257 of the National Land Code to satisfy the sums secured under the Charge including interests, costs and expenses incurred.

2. That the date of the auction sale herein be fixed on condition that the date is not less than one (1) month from date of this Order.

3. That the Senior Assistant Registrar be directed to fix a reserve price for such auction sale at a price equivalent to the estimated market value of the said lands.

4. That the Defendant and all those claiming through or under him in possession or occupation do forthwith quit and deliver vacant possession of the said lands within seven (7) days after the sale of the said property.

5. That the plaintiff be at liberty to bid at the sale.

6. That the proper authorities do register the name of the purchaser or purchasers of the said lands.

7. Costs.

8. That the Plaintiff be given liberty to apply.

9. Any other directions that this Honourable Court may deem fit and proper.

Enclosure 1 was supported by an affidavit affirmed on 9 August 2001 by Phang Moi Fung as seen in encl. 2 and reference to this enclosure will be made in this judgment.

Facts Of The Case

The defendant was described as the registered owner of the said lands. At the request of the defendant, the plaintiff by the name of Citibank Berhad and another bank by the name of OCBC Bank (Malaysia) Berhad as joint lenders agreed to make available to the defendant syndicated credit facilities pursuant to a facility agreement dated 28 June 1996 for the aggregate principal sum of RM60,000,000 (hereinafter referred to as "the facilities"). It was a condition precedent of the facility agreement dated 28 June 1996 that as security for the facilities, the defendant was required to execute and did execute a charge in favour of the plaintiff as security agent. So by way of a charge registered on 8 August 1996 in the register of charges *vide* presentation No: 41875/96, Jilid 111, Folio 55 (hereinafter referred to as "the charge"), the said lands were charged by the defendant to the plaintiff as security agent. Pursuant to the terms of the charge, the defendant agreed to pay the plaintiff on demand all sums due and owing to the plaintiff in respect of the facilities including the principal sum, interest outstanding and any other monies payable.

Sad to say, the defendant defaulted in paying the sums due and owing in respect of the facilities. The plaintiff acted swiftly and obtained a summary judgment against the defendant in respect of the sums due under the facilities on 15 April 2002 as seen in exh. "B16" of encl. 18. It was therefore crystal clear that the sums were due and owing by the defendant.

Notwithstanding the issuance of the letter of demand dated 21 June 2001 and Form 16D to the defendant, the latter still failed to make the necessary payments in respect of the facilities.

It must be borne in mind that there was no dispute that the defendant executed the charge in favour of the plaintiff. It was also not disputed that the plaintiff had issued the letter of demand and Form 16D to the defendant and that it was also not disputed that the defendant had received these demands.

Phang Moi Fung, the agency head of the plaintiff, who was duly authorised to affirm an affidavit on behalf of the plaintiff proceeded to do so on 7 October 2002 as seen in encl. 25. All the facts deposed to in encl. 25 were said to be within the personal knowledge and from the records and documents of the plaintiff which Phang Moi Fung had access to and to which he believed to be true and accurate. In encl. 25, Phang Moi Fung alluded to the details of the amount due and owing as at 23 October 2002 which incidentally was the date of the hearing of encl. 1.

Enclosure 25 was very thorough. Suffice for me to say that everything was incorporated therein.

Issues To Be Determined

The following issues were ventilated before me:

(1) whether the defendant was in breach of its obligations under the terms of the charge?;

(2) whether the plaintiff was entitled to claim the sums due and initiate this action pursuant to the terms of the charge?; and

(3) whether the defendant has shown cause to the contrary?

I will now proceed to examine these issues in succession.

The First Issue

There was failure on the part of the defendant to make the necessary payments for the facilities and this prompted the plaintiff to issue a letter of demand and Form 16D. The defendant did not deny receiving these notices of demand. Notwithstanding these demands the defendant failed to pay the sums claimed.

It was part and parcel of my judgment that the defendant by failing to make the necessary payment of the outstanding sums had acted in breach of its obligations under the charge. I will now allude to the relevant terms of the charge as seen in exh. "B2" of encl. 2 which would clearly show the magnitude of the matter:

Clause 3.01 of the charge states as follows:

> Section 3.01 **Specific Charge**
>
> As security for the repayment of the indebtedness the Chargor hereby charges the Lands by way of a first legal charge under the National Land Code in favour of the Security Agent as trustee for the Lenders.

Clause 3.02 of the charge is worded in this way:

> Section 3.02 **Continuing Security**
>
> The security created by this Charge is expressly intended to be and shall be a continuing security for the indebtedness and all other monies whatsoever now or hereafter from time to time owing to the Lenders by the Chargor whether alone or jointly and severally with another or others and whether as principal or surety notwithstanding that the Chargor may at any time or times cease to be indebted to the Lender for any period or periods and notwithstanding that the account or accounts of the Chargor with the Lenders may from any cause whatsoever cease to be existing and notwithstanding any settlement of account or accounts or otherwise.

The sting of the words employed in the charge can never be denied. On the facts, it was quite apparent that the defendant had acted in breach of the terms of the charge when the defendant failed to make payments of the sums due and owing under the facilities.

A charge is a security transaction under the National Land Code 1965 ("NLC") where land is pledged for the repayment of a loan or payment of an annuity or some other method of payment. Here, we are only concerned with the repayment of the loan in the form of the facilities. The charge when registered takes effect immediately by way of a security as a legal interest in the land. This was what had happened to the said lands.

Under the NLC, as a chargee the plaintiff would have certain remedies. Where the chargor has defaulted in the performance of any covenant, either express or implied, the chargee may proceed to obtain an order for sale under s. 253 of the NLC and also for possession thereof under s. 271 of the NLC. Now, the power of sale is given to any registered chargee – be it the first or subsequent chargee and whether the charge is related to land or a lease of land. Whereas the right to possession is only given to a first chargee of a piece of land unless the Minister otherwise directs and empowers some individual other than a first chargee to take possession.

As I said, a charge will take effect as a security transaction under the NLC only upon registration. So a charge under the NLC once registered would amount to an interest in the land. In *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, FC, it was held that an agreement to secure a debt in favour of the creditor in respect of the debtor's land may create an equitable charge giving rise to an equitable right in favour of the creditor although no charge within the provisions of the NLC had been executed or created. But on the authority of *Oriental Bank v. Chop Seng Restaurant (Butterworth) Sdn Bhd* [1990] 3 MLJ 493, it would appear that until the charge is registered, the unregistered chargee has no right to enforce the charge under the NLC, although the chargee may seek recourse under the contract itself. Incidentally, by way of digression, it is germane to mention that if the unregistered chargee has custody of the issue document of title, there may exist a right to a lien (*Standard Chartered Bank v. Yap Sing Yoke & Ors* [1989] 1 CLJ 530; [1989] 2 CLJ (Rep) 500).

The chargee must serve a notice on the chargor before the chargee applies for an order for sale. Under the NLC, the notice may be a statutory notice under either Form 16D – which was the case here, or Form 16E or in the form of a letter followed by a statutory notice as envisaged in *Malaysian International Merchant Bankers v. Dhanoa Sdn Bhd* [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193. It is pertinent to note that Form 16D would be the relevant notice to

send where the breach of the agreement has continued for at least one month or for any other specified period of time. Whereas Form 16E would be used in cases where the principal sum is payable on demand. On the authority of *Jacob v. Overseas Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161, it is settled law that the chargee may also use Form 16E to recover the principal sum as well as the interest which has become due and payable provided that the principal sum is payable on demand. It must be emphasised that Form 16E is specially provided for such purpose and that Form 16D being in the nature of a general form of notice may also be used in such a case (*Mary Michael v. United Malayan Banking Corp Bhd* [1971] 1 MLJ 172).

In the context of the present case, Form 16D that was used was perfectly in order. So was the letter of demand.

I venture to say that a notice of demand in respect of two charges where the sums under both the charges are lumped together will not be regarded as defective where, in the circumstances of the case, the chargor had not been prejudiced or misled by any defect in the said notice (*Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd* [1986] 2 MLJ 253 – where the Privy Council dismissed an appeal from the decision of the Federal Court that was reported in [1984] 1 CLJ 78; [1984] 1 CLJ (Rep) 363). Likewise, a notice of demand which fails to state the exact and precise amount owing does not have the effect of rendering the notice invalid unless it demands payment of a sum to which the chargee is not entitled (*Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467).

I reiterate that in the context of the present case, the letter of demand dated 21 June 2001 and form 16D were perfectly in order and they were received by the defendant thereto.

That would be a brief resume of the law. As far as the present plaintiff was concerned, the said lands were to be sold in order to recover the monies advanced under the facilities. The defendant was clearly in breach of its obligations under the terms of the charge and must be held accountable thereto.

The Second Issue

I would answer this issue in the affirmative. That based on the defendant's failure to make payment of the sums due, the plaintiff was entitled pursuant to the terms of the charge to institute and initiate the present action.

The relevant terms of the charge will now be reproduced and highlighted:

Clause 6.01 of the charge states as follows:

> Section 6.01 **Statutory Notice**
>
> In the event of:
>
> (i) any breach by the Chargor or the failure by the Chargor to pay any of the monies due owing and payable by the Chargor to the Facility Agent and/or the Security Agent and/or the Lenders under the Facility Agreement;
>
> (ii) any breach by the Chargor of any of the agreements covenants terms stipulations and undertakings herein and in the other Security Documents provided and on the part of the Chargor to be observed and performed;
>
> (iii) any Event of Default shall have occurred or is occurring and any event which would with the giving of notice or lapse of time, or both, constitute such an event has occurred and is continuing.
>
> for such period of time as provided in the Facility Agreement and which at the end of such period is in the opinion of the Security Agent is capable of remedy or rectification but is not remedied or rectified, the Security Agent may forthwith give to the Chargor the statutory notice under and pursuant to the provisions of the National Land Code requiring the Chargor to remedy or rectify the said breach within a period of seven (7) days from the date such statutory notice is served or deemed to be served under the provisions hereof.
>
> Service of such statutory notice shall be effected in the manner provided in Section 8.15 or as may be prescribed by the National Land Code. If at the expiry of the period specified in such statutory notice the Chargor fails to remedy or rectify the breach specified therein, the Security Agent may apply for an order for sale of the Lands pursuant to the provisions of the National Land Code.

and it clearly gives the plaintiff the power as the security agent to apply for an order for sale of the said lands. That the plaintiff was entitled under the terms of the charge to initiate the present action can never be disputed. There was an event of default or breach under the charge and the plaintiff as the chargee was entitled to initiate the sale of the said lands. Whether the plaintiff was entitled to obtain the sale of the said lands will now be considered under the category of the third issue.

The Third Issue

By far, this was the most interesting issue. The law may simply be stated in this fashion. That the court will order the sale of any land on application of the chargee unless it is satisfied of the existence of any cause to the contrary as envisaged in s. 256(3) of the NLC.

The defendant resisted the plaintiff's application in encl. 1. It was the stand of the defendant that there was non-compliance with the procedural requirements as set out in O. 83 r. 3 of the Rules of the High Court 1980 ("RHC"). For convenience, I will now reproduce *verbatim* O. 83 r. 3 of the RHC:

> (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of:
>
> (a) the amount of the advance;
>
> (b) the amount of the repayments;
>
> (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
>
> (d) the amount remaining due under the charge.

and the defendant pointed out that the affidavit of Phang Moi Fung in encl. 2 did not state the particulars of the amount of the advance, as well as the amount of the repayments and the amount of interest in arrears at the date of the issue of the originating summons in encl. 1 and at the date of the affidavit in encl. 2 that was affirmed on 9 August 2001. The defendant further pointed out that at para. 10 of the affidavit in encl. 2, it was averred that the total sum accrued on the banking facilities granted to the defendant as at 15 June 2001 was as stated in Appendix 1 which was marked as exh. "B3"" thereto. But the amount of interest in arrears at the date of the issue of the originating summons in encl. 1 which was on 9 August 2001 was not mentioned in the affidavit in encl. 2. This non-compliance was said to be fatal. The defendant then cited the cases of *Bank Pertanian Malaysia v. Zainal Abidin Kassim & Anor* [1995] 2 MLJ 537 and *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 in support of their submissions and relied on certain passages in the judgment of the learned judges in these two authorities. In *Bank Pertanian Malaysia v. Zainal Abidin bin Kassim & Anor (supra)*, Mohd Hishamudin J had this to say at p. 541 of the report:

> In my opinion, the failure to comply with rr. 3(6) and 3(3), in particular, the failure to state:
>
> (a) the amount of the repayments; and
>
> (b) the amount of instalments in arrear,
>
> are serious omissions which warrant a dismissal of the action; for the absence of such pertinent information is highly prejudicial to the defendants. Especially

> so in the present case where, in view of the fact that the amount owing as alleged in the affidavit in encl 2 (RM48,766.52) is much lower than the amount of the loan (RM60,000), it is fair to infer that some repayments must have been made by the defendants. Fairness requires the chargee not only to state in the affidavit but also to state accurately the amount of repayments made and the amount of instalments in arrear. It hardly needs to be reiterated here that the purpose of the rule is also to protect the interest of the debtor/chargor.

Gopal Sri Ram JCA speaking for the then Supreme Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd (supra)* aptly said at p. 51 of the CLJ report:

> A judge hearing an application under s. 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

But, with respect, I have perused through the affidavits filed on behalf of the plaintiff and these affidavits have stipulated the sums due and owing and I was satisfied that there was compliance with the requirements of O. 83 r. 3 of the RHC. In these affidavits, the plaintiff had stated the amount owing, and the plaintiff too had stipulated the principal sum. The repayments that were made together with the interest or instalments owing at the date of the issue of the originating summons and at the date of the affidavit as well as the approximate daily interest were also stipulated in the affidavits. It was part and parcel of my judgment that the assertion that the plaintiff had not complied with O. 83 of the RHC was entirely without merit. The plaintiff's further affidavit in encl. 25 speaks a thousand words.

At any rate, the speech of Gopal Sri Ram JCA in *Low Lee Lian v. Ban Hin Lee Bank Bhd (supra)* at p. 51 of the CLJ report, puts paid to the defendant's complaints when his Lordship aptly said:

> Although each case turns upon its own facts, we propose to consider, by way of illustration only, the usual kind of case with which this Court has been faced on numerous occasions. An application under s. 256 is opposed by the chargor on the ground that the chargee has acted in breach of contract, eg., by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the sums paid by the borrower. A Judge faced with such complaints will merely say that they do not, on a proper reading of s. 256(3) and the

> authorities which have considered the section, constitute cause to the contrary. He will not, and ought not to, enter upon a discussion of the question whether any or all of these complaints have or are devoid of any merit. Much confusion and difficulty has been occasioned in this area of the law by a failure on the part of those concerned with the task of dealing with applications under s. 256 to properly appreciate their true role assigned them by Parliament.

Again, according to Gopal Sri Ram JCA in *Low Lee Lian v. Ban Hin Lee Bank Bhd (supra)* that "cause to the contrary within s. 256(3) may be established only in three categories of cases" (see p. 44 of the CLJ report). His Lordship then proceeded further at p. 44 of the CLJ report to say:

> First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in section 340 of the Code establishes cause to the contrary.

At p. 45 of the CLJ report, his Lordship continued to say:

> Secondly, a chargor may show cause to the contrary within section 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale.

Finally, at p. 46 of the CLJ report, his Lordship said:

> Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity.

I am certainly bound by the categorisations as advanced by his Lordship Gopal Sri Ram JCA in *Low Lee Lian v. Ban Hin Lee Bank Bhd (supra).*

I reiterate once again that, factually speaking, the letter of demand and Form 16D were issued to the defendant and this was not denied at all. I too reiterate that the plaintiff's affidavits have clearly stipulated the sums due and owing and thus there was compliance with the requirements of O. 83 of the RHC. The plaintiff was certainly entitled to rely on other affidavits other than the affidavit in encl. 2. Indeed, this was the approach of Mahadev Shankar J (as he then was) in the case of *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608. There at p. 615 of the MLJ report, his Lordship aptly said:

> It is a well-established rule of construction that unless the context specifically so excludes, words in the singular must include the plural. It is to be noted that O. 83 r. 3(3) gives the court the power to dispense with the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date (eg for non-service) and at least one further affidavit is always required to state the total amount due on the date of the order. Provided evidence of the correct amount due has been put before the final

> hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant.

Further down the same page, his Lordship remarked:

> A bare denial of a debt was never enough. The chargor also has an onus if he denies the amount claimed to say how much he admits owing. In this kind of case, the dismissal of the application for non-compliance with some aspect of the rules does not extinguish the debt. The chargee can start afresh but there will then be additional costs, interest and delay.

It was correctly submitted on behalf of the plaintiff that the defendant had failed to raise any credible issue to dispute the sums claimed under the facilities and that a bare denial of the debt on the part of the defendant was insufficient. Indeed, the affidavits filed on behalf of the defendant were of no assistance at all. They were affidavits of mere denials and, as the law stands, denials of debts of this nature afford no assistance to the defendant and such denials cannot constitute cause to the contrary (*OCBC Bank (M) Bhd v. CTK Enterprise Sdn Bhd* [2000] 6 CLJ 158; and *Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd* [2000] 2 CLJ 73). At any rate, all the relevant information had been incorporated in the plaintiffs further affidavit in encl. 25 that was affirmed and deposed by Phang Moi Fung and the figures stipulated therein were not challenged by the defendant at all. So it can be surmised that the defendant's allegations were entirely baseless and should be disregarded as they did not constitute cause to the contrary.

The defendant vigorously relied on the case of *Bank Pertanian Malaysia v. Zainal Abidin bin Kassim & Anor (supra)* but, with respect, that reliance was misplaced because in that case all the three affidavits that were filed by the plaintiff there did not state the amount of the repayments and the amount of instalments in arrear. Here, in the present case, the plaintiffs further affidavit in encl. 25 clearly stipulated the repayments that were made and it too stated the amount of interest owing at the date of the filing of the originating summons in encl. 1 and at the date of the hearing of the originating summons. Of pertinence to note would be the failure on the part of the defendant to raise any dispute in respect of the sums that were said to be due and owing. The sum total of it all would be this. That the affidavits of the plaintiff constituted conclusive evidence of the amounts that were due and owing by the defendant to the plaintiff. In this regard, reference to cl. 8.11 of the charge should be made and there it is stated as follows:

> Section 8.11 **Statement by the Security Agent**
>
> Any statement issued by any authorised officer of the Security Agent and/or the Facility Agent and/or the Lenders from time to time as to the amount of monies and liabilities from time to time incurred or due to the Security Agent

and/or the Lenders by or from the Chargor (save for manifest error) shall be deemed to be accepted by the Chargor as final and conclusive for all purposes whatsoever including for the purpose of legal proceedings.

For all these reasons, I ruled that the plaintiff had complied with the procedural requirements as stipulated in O. 83 r. 3 of the RHC.

Another ground which the defendant utilised in resisting the plaintiffs application in encl. 1 was this. That there was a re-structure of the facility agreement which resulted in the terms therein to be varied. This, according to the defendant, constituted cause to the contrary. But the plaintiff denied vehemently that the terms of the facility agreement were in any way altered or varied. The plaintiff rightly contended along the following lines:

(a) That while there were negotiations between the parties in respect of a proposed re-structuring and the possibility of the execution of the supplementary agreement, there was no final agreement reached between the parties. The supplementary agreement was never executed and so the proposed restructuring did not materialise (see the affidavit of Phang Moi Fung that was affirmed on 27 September 2001 as seen in encl. 6 particularly at para. 7.1).

(b) That while the plaintiff did stipulate that they would be agreeable to a proposed re-structuring scheme, a perusal of the documents would show that this was stipulated to be subject to agreement of the remaining terms and the execution of the supplementary agreement. But, alas, this was never done (see the affidavit in encl. 6 at paras. 6.3 and 6.5 respectively).

(c) That the fact that the supplementary agreement was subject to conditions, was also alluded to by the defendant (see the affidavit in encl. 6 at para. 6.4 and the affidavit in reply of Zulkifly bin Garib that was affirmed on 13 September 2001 as seen in encl. 5 which annexed an exhibit marked as "ZG1").

(d) That, consequently, due to the fact that no supplementary agreement was entered into between the parties, the facility agreement dated 28 June 1996 would remain valid and binding between the parties.

(e) That while the parties did enter into a debt re-structuring agreement yet the defendant was unable to comply with the conditions precedent of that debt re-structuring agreement. So the defendant informed the plaintiff that the debt re-structuring agreement had to be abandoned. In the light of this, the defendant then proposed a new re-structuring scheme (hereinafter referred to as the "second scheme") – see the affidavit in encl. 6 at para. 6(b) and at para. 6(c).

(f) The plaintiff held onto the views that while they would consider negotiating a new proposal, yet that new proposal must be based on terms acceptable to the plaintiff. At any rate, the defendant had not adhered to the terms of the existing proposed re-structuring scheme (see the affidavit in encl. 6 at para. 7.3 thereto).

(g) The defendant was unhappy with the second scheme and they subsequently stated that they were unable to comply with the terms as stipulated in the second scheme (see the affidavit in encl. 6 at para. 7.5 and exhibit marked as "B11" which is annexed to encl. 6).

All these would show that there were negotiations in respect of the restructuring schemes which miserably failed. The re-structuring schemes did not materialise because the conditions precedent which included the execution of formal agreements were never fulfilled. In short, the facility agreement dated 28 June 1996 was never replaced and till today it remained intact.

Whether a contract is operative or not, it may be dependent upon a contingency. For instance, the operation of a contract may be subject to a condition precedent. And until that condition precedent occurs, the contract is said to be inoperative. As so if the fulfilment of the condition is not an obligation of the contract, there is thus no question of a claim in breach of the contract when that condition is not fulfilled.

It is trite law that a contract comes into existence where there has been an unqualified acceptance of a definite and unequivocal offer. There can be no binding contract when the conditional offer is followed by an unqualified acceptance or when the unqualified offer is followed by a conditional acceptance. In either of these two cases no legally binding contract will arise unless and until the stipulated condition is fulfilled. The terminology "subject to contract" and its variants are usually associated to a contract between two parties in relation to the sale and purchase of a piece of land. There are numerous authorities reported in the law journals pertaining to the "subject to contract" situations. Suffice for this exercise that I will refer to some of them. The case of *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch 284 is a case in point. There, an alleged contract for the sale of a leasehold house was contained in letters where it was stipulated by the purchaser that her acceptance was subject to, amongst others, a condition that her solicitors should "approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract". It was held that on the construction of the documents there was no complete contract susceptible of being enforced by way of specific performance. In *Lockett v. Norman Wright* [1925] 1 Ch 56, it was held that the expression "subject to suitable agreements being arranged between your solicitors and mine" was a condition precedent to any concluded bargain and

did not make the solicitors agents to conclude the bargain and accordingly it was held that there was no absolute contract between the parties where the plaintiff could enforce. In *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76;([1983] CLJ (Rep) 282) Salleh Abas CJ (Malaya) speaking for the then Federal Court had this to say of contingent contracts (see p. 83 (p. 289) of the report):

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled. (See *Trans Trust SPRL v. Danubian Trading Co Ltd* [1952] 2 KB 297, 304 – per Denning LJ – and *Property and Bloodstock Ltd v. Emerton; Bush v. Property and Bloodstock Ltd* [1967] 3 All ER 321, 330 – per Sachs, LJ. Until the FIC approval was given liability for further performance remained unenforceable, ie, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by section 33(a) of the Contracts Act which enacts:
>
> 33.(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with section 33(b) of the Contracts Act, which is as follows:
>
> 33.(b) If the event becomes impossible, such contracts become void.

Next, it would be the case of *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625, where Gopal Sri Ram JCA speaking for the Federal Court had this to say in regard to "subject to contract" arrangements (see pp. 632 to 633 of the report):

> Although the judgment of Edgar Joseph Jr SCJ in *Ayer Hitam* contains all the learning upon the subject, we would, for completeness, refer to the following passage in the joint judgment of Dixon CJ, McTiernan and Ritto JJ, in *Masters v. Cameron* [1954] 91 CLR 353:
>
> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their

> negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
>
> In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.
>
> Meaning no disrespect to counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract."

This would be followed by the case of *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133, where Edgar Joseph Jr SCJ speaking for the then Supreme Court observed at p. 141 of the report:

> But it is now well settled that when an arrangement is made 'subject to contract' (see *Rossdale v. Denny* [1921] 1 Ch 57; [1921] 90 LJ Ch 204) or 'subject to the preparation and approval of a formal contract' (see *Winn v. Bull* [1877] 7 Ch D 29) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

All these authorities weighed heavily in favour of the plaintiff. The re-structuring schemes did not materialise at all. It did not see the light of day. It was therefore apparent that the terms of the facility agreement dated 28 June 1996 was never superceded nor replaced and it remained valid and binding on both the parties until today.

In regard to the purported moratorium which the plaintiff had purportedly agreed in respect of the proceedings against the defendant, I have this to say. That there never was any moratorium as envisaged by the defendant and the plaintiff had said so in its affidavit that was deposed by Phang Moi Fung on 8 November 2001 as seen in encl. 9, particularly at para. 6.1 thereof. It was also deposed by Phang Moi Fung in encl. 9 at para. 6.3 that all the allegations of the defendant that the plaintiff had requested for a moratorium were false and erroneous. It would be pertinent to point out that the defendant had failed to show any proof whatsoever of an agreement to enter into a moratorium and all the allegations advanced by the plaintiff remained mere bare assertions unsupported by any credible evidence.

Conclusion

This was a clear cut case in favour of the plaintiff. It was a case where the defendant had, pursuant to the terms of the charge, agreed to pay on demand all sums due and owing to the plaintiff and this was never denied by the defendant. This was also the case where the defendant had blatantly breached the terms of the charge and had failed and refused to make payment of the sums due as demanded in the notice of demand and in Form 16D. This was also the case where the defendant had failed to show any cause to the contrary, to my satisfaction, in order to defeat the plaintiffs claim. This was also the case – a classic one at that, where all the issues and allegations levelled by the defendant and advanced earnestly by the defendant were not sufficient to constitute cause to the contrary. The plaintiff, at the end of the day, was certainly entitled to an order for sale as prayed for. Accordingly, for all these reasons, I gave an order in terms of encl. 1. I too gave the tentative date for auction on 27 March 2003 – a rather long date with a view, perhaps, that the parties may come to an amicable settlement.